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7 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
8

9 SECURITIES AND EXCHANGE
COMMISSION,
10 Applicant,
11 vs.
12 MICHAEL J. HOOPER,
13 Respondent.

Case No: 2:16-MC-00022-MKD

RESPONDENT'S
SUPPLEMENTAL
MEMORANDUM

14
15 Respondent Michael J. Hooper ("Respondent"), by and through his
16 attorney of record, hereby submits the following supplemental memorandum
17 pursuant to an Order [19] by the Court at the Show Cause hearing held on
18 October 12, 2016.

19 **A. Ninth Circuit Precedent Is Not Consistent With SEC's**
20 **Request For Disgorgement**

21 An exhaustive search of Ninth Circuit case law yields only one case
22 where proceedings were brought against an accountant for violating a prior
23 consent order that prohibited him from practicing or appearing before the
24 Securities and Exchange Commission ("SEC") as an accountant pursuant to
25 Rule 102(f). This case is *Sec. & Exch. Comm'n v. Amundsen (N.D. Cal., 2012)*

1 [See Ex. 1, attached hereto]. Decided on January 19, 2012, *Amundsen* is a
2 recent case prosecuted by the SEC San Francisco Regional Office.

3 In 1983 Joseph Amundsen, a certified public accountant, voluntarily
4 entered into a consent decree “**permanently**” barring him from “practicing:
5 before the Commission.” Twenty years later, in 2003 Amundsen regained his
6 California State CPA license and proceeded to develop a niche practice of
7 preparing audited financial statements with accompanying signed and certified
8 audit reports for broker-dealers. These audited and certified documents were
9 filed with the SEC. Court records state that during the ensuing nine-year
10 period, Amundsen “prepared, audited, and certified” over 1,000 of these
11 documents that were signed and filed with the SEC.

12 The court determined that there was no question that Amundsen’s 1,000
13 audit engagements qualified as “appearing or practicing before the SEC as an
14 accountant” all in clear violation of his 1983 permanent bar to do so. He was
15 clearly representing and attesting to the accuracy of his client’s financial
16 condition in the audited statements that he prepared and certified under
17 generally accepted auditing standards (GAAS), as well as SEC rules and
18 regulations. His consent for submission was expressly provided in the signed
19 audit reports that were filed with the SEC.

20 Although the Court was reluctant to “shut down an entire line of
21 business of a licensed CPA but after considerable deliberation over this
22 motion”, the Court decided as follows:

23 For the foregoing reasons, this order directs defendant Joseph
24 Amundsen to cease preparation of all audit reports destined for filing
25 with the Commission, including audit reports on financial statements
for broker-dealers so destined for filing with the Commission. He
must immediately notify all clients involved in such pending matters
of this order. He must file with the Court a complete list of all audit

1 reports for broker-dealers he has signed since 2003, identifying each
 2 by date and name of the broker-dealer. This must be filed within 28
 3 calendar days. **This order, however, declines to compel defendant
 to disgorge any fees earned by him since 2003.** [*Emphasis Added*]

4 In *Amundsen* the SEC also contended that the defendant's no-practice
 5 bar extended to the preparation of unaudited financial statements to be filed by
 6 others. The SEC's contention was that Amundsen's no-practice bar extended
 7 beyond preparing and certifying audited financial statements and reports filed
 8 with the SEC. The Court decided to leave this issue for the future.

9 The *Amundsen* Court's decision to deny the SEC's request for
 10 disgorgement has significant ramifications regarding the Respondent's earlier
 11 argument that the SEC's complaint was not filed within the statutory five-year
 12 time constraints of §2462. The Respondent has briefed that the post-*Gabelli*
 13 Appellate Court decision, *Graham v. SEC*, extends the Supreme Court *Gabelli*
 14 decision to all forms of civil penalties, to include disgorgement. To justify the
 15 imposition of disposition under all circumstances, the SEC has forwarded a
 16 pre-*Gabelli* Ninth Circuit decision involving fraudulent and massive securities
 17 violations, *SEC v. Rind*, 991 F. 2d 1486 (9th Cir. 1993). The Respondent
 18 acknowledges a conflict regarding a widening circuit split post-*Gabelli*
 19 involving the applicability of §2462 to disgorgement attempts by the SEC.
 20 However, an analysis of the Court's decision in *Amundsen* may render the
 21 need for that conflict in this case moot.

22 **B. The Respondent Did Not Appear or Practice Before the SEC**

23 The Respondent has previously briefed that the terms "appear or
 24 practice" (in the context of Rule 102(f)) and adheres to a specific legal lexicon
 25 that would not extend to ministerial bookkeeping efforts. Although court
 decisions that involve the IRS typically do not impact the SEC, a 2014

1 decision by the U.S. Court of Appeals is germane to this argument. The case,
2 *Loving v. IRS*, No. 13-5061 (D.C. Cir., slip op. dated Feb 11, 2014)
3 questioned whether the IRS can regulate individuals who assist taxpayers in
4 preparing their tax returns, when these preparation efforts do not extend to the
5 representation of these taxpayers in disputes with the IRS. The Court's
6 decision was that although the IRS has the express statutory authority to
7 regulate the practice of representatives of persons before it, tax-return
8 preparers neither "represent" taxpayers nor "practice" before the IRS. The
9 Court further held that,

10 IRS Preparers don't "**practice before**" the IRS because that term, as
11 ordinarily understood, means to represent someone during an
12 investigation, adversarial hearing, or other adjudicative proceeding
[*Emphasis Added*]

13 The *Loving* decision casts serious doubts on the SEC's ability to
14 regulate bookkeepers pursuant to Rule 102(f), who merely assist in the
15 preparation of financial records to be filed with the SEC. The SEC will argue
16 that the *Loving* decision is unpersuasive as Congress gave the SEC broader
17 authority to establish its own rules of practice under the Securities and
18 Exchange Act of 1934. It is critical to note that Congress has never explicitly
19 empowered the SEC to regulate who can be involved in the initial preparation
20 of documents that are ultimately filed with the SEC. Consistent with the tax-
21 return preparers in the *Loving* decision, who did not "practice before" the IRS,
22 the Respondent did not "practice before the SEC" when he assisted in the
23 preliminary assemblage of financial records.

24 The SEC has stated that it is imperative to the integrity of the financial
25 markets that the SEC wields the power to regulate all participants involved in
at any level in the preparation of financial documents and statements filed by

1 public companies. The sheer magnitude of the number of individuals involved
2 in this process renders this assessment illogical. Additionally, the SEC's
3 assumed regulation of the Respondent is unnecessary. All violations alleged
4 in the Complaint representing the Respondent's work product were reviewed,
5 revised, and expressly consented for filing by professional signatories. The
6 actions and final documents of those professional signatories (auditors,
7 attorneys, and corporate executives) do "practice before the SEC" and are
8 under the direct jurisdiction of all rules and regulations of the SEC.

9 C. Conclusion

10 In conclusion, the three operative verbs in Rule 102(f) (prepare, consent,
11 and file) are only relevant if they are performed by an independent CPA, who
12 is designated by both the SEC and PCAOB to practice before the SEC. As
13 previously briefed, the SEC did not formally articulate the requisite definition
14 for an accountant until 2002. For these reasons and others, the Respondent
15 continues to maintain that the Consent Agreement signed some 17 years ago
16 was ambiguous. The agreement did not provide the Respondent with the
17 ability to ascertain what subsequent services he was able to provide to public
18 companies. Further, there was no mention of disgorgement as a penalty for
19 non-adherence to the agreement. Evidence of the ambiguity contained in the
20 1999 Consent Agreement is that the gravamen of this Complaint and the
21 penalty to impose are nebulous and must now be decided by the Court.

22 DATED this 19th day of October 2016.

23 s/ Alan L. McNeil

24 ALAN L. McNEIL, WSBA #7930

25 Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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